



Panel V

Commentary—The Road Ahead

Jane Dalton¹

I believe that September 11th proved beyond any reasonable doubt that international treaties and other negotiated documents are not sufficient, by themselves, to win the War on Terrorism. I was in the Pentagon when the attack came and there is no doubt in my mind that the Pentagon and the United States were attacked with weapons of mass effects. Some 3,200 people from more than 90 countries throughout the world died on that day.² This was an attack on democracy, on liberty and on religious freedom. This was not the first armed attack by these terrorists on these core American values either. This was one of a continuing series of attacks, beginning in 1993, if not before, with the first World Trade Center bombing. These armed attacks included the 1998 embassy attacks in Kenya and Tanzania and continued with the tragic attack on USS *Cole* in 2000.

For me then, it is interesting to consider the concept of preemption or anticipatory self-defense while in the middle of an armed conflict as these two concepts do not seem well juxtaposed at times. In World War II and the Gulf

1. Navy Captain Jane Dalton is currently the Legal Advisor to the Chairman of the Joint Chiefs of Staff.

2. See *Fact Sheet: September 11th, 2001 Basic Facts*, Department of State (Aug. 25, 2002), available at <http://www.state.gov/coalition/cr/fs/12701.htm> (Oct. 30, 2002).

War, enemy forces were declared hostile. No hostile intent was necessary before striking enemy forces. Being engaged in armed conflict, the United States appropriately took the fight to the enemy, not waiting for the enemy to come to us, nor waiting for some indication of hostile intent or hostile act. Looking at the series of events occurring since 1993, it is clear that the United States is currently involved in an armed conflict, an ongoing conflict where preemptive or anticipatory self-defense is not an issue.

If one were to ask leaders of al Qaeda this instant, whether or not they were involved in an armed conflict with the United States, they would assuredly answer yes. Their actions have made this clear as have their words. I believe that they are at this very moment planning more attacks on the United States for the very next possible instant that they can accomplish these attacks.

I concur with John Murphy that imminence takes on a new meaning when you are talking about weapons of mass destruction. Perhaps the new paradigm regarding such imminence or immediacy is not that used in World War II or in Iraq when forces were massing on borders or scud missiles were flying. Perhaps instead the new paradigm must consider that at the next possible opportunity the United States will have to act decisively to prevent an attack on the United States. The intelligence indicators found in past conflicts do not apply in this one; we will not see armored units massing on an opposing border. What may be found, however, is the constituent components necessary to build weapons of mass destruction (WMD) being transferred from a country to a terrorist group. The indicators of the future may be the assembly of components and the conducting of tests. This point in time may now be the United States last possible opportunity to prevent an attack. For if the threat is not eliminated then, it may be impossible to eliminate it later. This, to me, is the new concept of imminence that scholars and practitioners must understand.

One reason the UN condemned the Israel attack on the Osiraq reactor was because the threat caused by the reactor, providing enriched uranium for Iraqi nuclear weapons development, was foreseeable but not imminent.³ Today the situation may well be reversed. That is, we know that an attack is imminent, but it is difficult to foresee exactly where or when the attack will occur. Given this case, the United States must strike now while it has the enemy and their weapons in its sites and it is within US capabilities to strike. Delaying such a strike may cause the opportunity to evaporate forever.

3. See G.A. Res. 36/27 (Nov. 13, 1981), available at <http://www.un.org/Depts/dhl/res/resa36.htm> (Oct. 30, 2002). See generally, Mallison & Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT'L L. 417 (1982).

I agree with the idea that there are self-defense criteria that should be studied before acts in self-defense are undertaken. These four criteria are: do objective indicators that an attack is imminent exist; does past conduct or hostile declarations reasonably lead to the conclusion that an attack is probable; do the nature of the weapons available support a likely attack; and are there no other practicable means than the use of force to mitigate/eliminate the threat. Regarding objective intelligence indicators, although I cannot reveal classified intelligence here, I believe that there are substantial objective indicators that an attack is imminent. On the second criterion, the past conduct of al Qaeda from 1993 to the present coupled with present declarations are nothing short of hostile and indicate that other attacks are planned. As to the third criterion, al Qaeda has proven its ability to be extremely flexible and agile, making civilian airliners as well as simple pleasure boats into weapons. Finally, are there other options short of using force to mitigate/eliminate the threat—there do not seem to be such options available. When people are willing to martyr themselves, there is very little deterrence that you can use. When terrorists belong to no territory, when they have no population which they are trying to protect, when their goal is to destroy innocent civilians, then the concept of deterrence becomes an entirely new challenge. Traditional deterrence as we know it does not seem to apply to such zealots.

Yoram Dinstein's position on interceptive self-defense also intrigues me.⁴ This notion of an irreversible course of action commencing might merit further study. I am uncertain as to what metrics we might develop for measuring what is truly an irreversible course of action other than by studying exactly the things that we have previously discussed, the history of a group, its stated intent, the weapons available, alternative courses of action, etc. Clearly, even using interceptive self-defense, actions of the United States would still be bound by proportionality and discrimination.

Recall also that the use of military force is only one of the many instruments of national power at our disposal. We must continue to use all available sources to achieve our objectives. The conventions that John Murphy spoke of, as well as diplomacy, economic and other sanctions, law enforcement, are all available instruments of power. These instruments of power should be used relentlessly, on all fronts, as appropriate. The joint rear area coordination

4. Professor Dinstein argues that “[i]nterceptive, unlike anticipatory, self-defense takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike anticipates an armed attack, an interceptive strike counters an armed attack which is ‘imminent’ and practically ‘unavoidable.’” See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* (3d ed. 2001) 172–173.

group that Ron Winfrey spoke about in the Pacific Command area of operations also exists in the Southern Command, European Command and the Central Command. These different exercises of US instruments of power are all absolutely critical. Having said this, the United States should not hesitate to use military force to accomplish “involuntary disarmament” of its enemies when necessary.

As Ron Winfrey indicated, the greatest current need is for actionable intelligence. The United States must improve its ability to conduct intelligence gathering, surveillance, and reconnaissance. We are working towards this. As an example, Germany has been an exceptional ally in support of our intelligence gathering efforts to support our maritime interdiction operations in the Central and European Commands’ areas of responsibility. Similarly, the Philippine Armed Forces have increased dramatically both their intelligence gathering and counter-terrorism forces in the last 12 months.

Still another point to be made though is that an increase in US capabilities is not, by itself, enough. Other states must also step to the forefront and take action. The United States is available to assist such states as Yemen and Georgia, but we cannot do it for them. The United States should not be required to be the world’s protector. Other states must also accept responsibility for their own safety. The United States will certainly be willing and able to continue to advise and assist in this respect as we are doing in the Philippines and Georgia and Yemen.

Similarly, if we wish to expand regional cooperation, we must expand the funding available for such cooperation. As you well know, the Department of Defense is constrained in its ability to conduct security assistance missions since it receives no direct funding for such missions. Instead, the Department of State, as the Security Assistance Program Manager, receives funding for security assistance and then determines how this funding will be spent. If we wish to improve our coordination and cooperation with our allies, we must pursue alternative and additional funding to increase our ability to train alongside and conduct exercises with our allies. A significant challenge to accomplishing these missions is the restriction on expenditure of funds that constrains the Department of Defense.

Finally, the coming years offer many challenges as we deconflict jurisdiction in the homeland defense arena. The United States has significant challenges facing it that must be overcome so as to ensure that the Department of Defense, the Federal Bureau of Investigation, the Central Intelligence Agency, the Coast Guard, the Bureau of Alcohol, Tobacco, and Firearms, the Secret Service and other agencies understand who has primary control over

what specific types of operations and in response to what specific threats occurring in the homeland of the United States.